Holsten Marketing (M) Sdn Bhd & Ors v TSK Commodities Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(NCVC)(W)-1043–06 OF 2022
KAMALUDIN MD SAID, NANTHA BALAN AND WONG KIAN KHEONG JJCA
4 MARCH 2024

Contract — Breach — Performance — Order of performance of mutual obligations — Whether plaintiff's failure to perform obligations under contract relieved defendant of performing its obligations — Whether contract did not become impossible of performance due to any supervening event beyond control of parties but solely due to plaintiff's breach — Whether defendant was contractually entitled to forfeit monies paid by plaintiff under the contract as agreed damages for plaintiff's breach — Whether forfeited sum was 'reasonable compensation' to defendant under s 75 of Contracts Act 1950

The respondent ('TSK') entered into a contract to buy 5,000 metric tonnes ('mt') of refined sugar ('the goods') from the first appellant ('Holsten') at a price of USD560 per mt. Prior to that contract, Holsten had contracted to buy the same quantity of the goods from Central Sugars Refinery Sdn Bhd ('CSR') at USD550 per mt. TSK paid Holsten an agreed upfront payment of RM1,256,080 (equivalent to USD280,000) ('the prepayment sum') under the contract but never received any supply of the goods from Holsten. TSK demanded for the return of the prepayment sum but Holsten contended that TSK had breached the contract by failing to order the goods during the validity period of the contract — from 4 April 2017 until 31 July 2017 — and that because that period had lapsed, Holsten had forfeited the prepayment sum. In its suit against Holsten to recover the prepayment sum, TSK pleaded that Holsten had failed to forward to TSK certain shipping documents that it was obliged to furnish under the contract and that the second and third appellants (who were directors of Holsten) were liable for misrepresenting to TSK that it stood to make a profit by entering into the contract as the market price of the goods at that time was higher than the contract price (when in reality it was not so). Holsten denied TSK's claim and counterclaimed for various losses it had suffered including loss it had incurred in disposing of the goods meant for supply to TSK to third parties. Holsten also claimed for loss of profits that it would have made if TSK had duly performed the contract. The second and third appellants denied that they had made any representations to TSK. Following a trial, the High Court dismissed Holsten's counterclaim (except for a penalty of RM225,000 that Holsten had to pay CSR) and allowed TSK's claim against Holsten in the sum of RM1,031,000. In coming to its decision,

the High Court held that: (a) both TSK and Holsten had breached the contract; (b) performance of the contract had become frustrated; (c) Holsten had no right under the contract to forfeit the prepayment sum which it was obliged under ss 74(3) and 75 of the Contracts Act 1950 to return to TSK minus the RM225,000 which Holsten had to pay CSR as penalty under their contract; and (d) the second and third appellants were not liable to TSK for misrepresentation. Holsten appealed against the decision.

Held, unanimously allowing the appeal in part:

(1) Clause 17 of the contract expressly incorporated The Refined Sugar Association ('RSA') Rules into the contract. The High Court judge ('HCJ') erred in failing to consider, let alone apply, cl 17 and the RSA in the instant case (see para 17).

(2) Clause 7 of the contract expressly provided that the contract was only valid from 4 April 2017 until 31 July 2017 ('the contractual period'). Rule 7(i) and (ii) of the RSA required TSK as buyer of the goods to perform the following obligations — to give notice to Holsten within the contractual period of particulars of the name of the vessel on which the goods were to be shipped by Holsten, the expected time of arrival of the ship at the load-port, the tonnage of the goods that were to be loaded onto the vessel, the freight booking reference relating to the vessel, the location of the depots of the shipping line from which the empty containers were to be collected by Holsten, the opening and closing container stack dates of the loading terminal in respect of the nominated vessel and the contact details of the shipping line and loading terminal. Rule 26 of the RSA also required TSK's notice to Holsten to be delivered by courier or transmitted by fax or email. Since the word 'shall' was used in rr 7(i) and (ii) and in r 26 of the RSA, the performance required of TSK in the giving of notice to Holsten under those provisions was mandatory and only upon completion of that performance was Holsten required to carry out its obligations under the contract including packing the goods, obtaining insurance coverage for them and furnishing the relevant shipping documents to TSK in accordance with cl 10 of the contract. Once the shipping documents were presented to TSK, cl 9 required TSK to pay the balance of the contract price in cash within 72 hours and upon receipt of that sum Holsten was required to ship the goods during the contractual period. This order of performance of the respective obligations of the parties was not only expressly provided for under the contract but was also supported by s 35 of the Sale of Goods Act 1957 and s 53 of the Contracts Act 1950. The HCJ failed to give effect to the said order of performance of obligations by the parties (see paras 19–25).

(3) Since TSK failed to perform its obligations under the contract during the contractual period (due, as admitted by TSK, to the fall in the market

price of the goods), Holsten was relieved of the performance of its obligations under the contract. It was TSK that had breached the contract and the HCJ was factually wrong in concluding that both TSK and Holsten had breached the contract (see paras 26–27).

(4) The HCJ erred in holding that the contract had been frustrated. The contract could not be performed solely because of TSK's breach. It did not become impossible of performance due to the occurrence of an event after the formation of the contract within the meaning of the first limb of s 57(2) of the Contracts Act 1950. The second limb of s 57(2) had no application because TSK could not rely upon its own breach to contend that the contract had been frustrated. TSK had never pleaded frustration under s 57(2) of the CA as a ground to discharge further performance of the contract. Nor did it file any written submissions regarding frustration of the contract (see para 30).

(5) The HCJ erred in invoking s 74(3) of the Contracts Act. That provision had no application in the instant case. It was only applicable in a case where there was no agreement but 'an obligation resembling those created by contract has been incurred' (see paras 31–32).

(6) Clause 9 of the contract was a penalty provision which allowed Holsten to retain the prepayment sum if TSK breached the contract. Considering the losses Holsten had suffered, the prepayment sum was 'reasonable compensation' to Holsten under s 75 of the Contracts Act 1950 and since s 75 barred Holsten from claiming any sum in excess of the prepayment sum, the High Court, on that ground alone, was justified in dismissing the counterclaim (see paras 39 & 41).

[Bahasa Malaysia summary

Responden ('TSK') telah memasuki kontrak untuk membeli 5,000 tan metrik ('mt') gula halus ('barangan tersebut') daripada perayu pertama ('Holsten') pada harga USD560 per tan metrik. Sebelum kontrak itu, Holsten telah mengikat kontrak untuk membeli kuantiti barangan yang sama daripada Central Sugars Refinery Sdn Bhd ('CSR') pada harga USD550 per tan metrik. TSK membayar Holsten bayaran pendahuluan yang dipersetujui sebanyak RM1,256,080 (bersamaan dengan USD280,000) ('jumlah bayaran pendahuluan') di bawah kontrak tetapi tidak pernah menerima apa-apa pembekalan barangan daripada Holsten. TSK menuntut pemulangan jumlah bayaran pendahuluan tetapi Holsten menegaskan bahawa TSK telah melanggar kontrak dengan gagal memesan barang semasa tempoh sah kontrak — dari 4 April 2017 hingga 31 Julai 2017 — dan kerana tempoh itu telah luput, Holsten telah kehilangan wang bayaran pendahuluan. Dalam samannya terhadap Holsten untuk mendapatkan semula jumlah bayaran pendahuluan, TSK memplidkan bahawa Holsten telah gagal untuk mengemukakan kepada TSK beberapa dokumen perkapalan yang ia wajib berikan di bawah kontrak

dan bahawa perayu kedua dan ketiga (yang merupakan pengarah Holsten) bertanggungjawab untuk salah nyata kepada TSK bahawa ia ingin mengaut keuntungan dengan memasuki kontrak kerana harga pasaran barangan pada masa itu lebih tinggi daripada harga kontrak (padahal sebenarnya tidak begitu). Holsten menafikan tuntutan TSK dan menuntut balas untuk pelbagai kerugian yang dialaminya termasuk kerugian yang ditanggungnya dalam melupuskan barangan yang dimaksudkan untuk dibekalkan kepada TSK kepada pihak ketiga. Holsten juga mendakwa kehilangan keuntungan yang akan diperolehinya jika TSK melaksanakan kontrak tersebut dengan sewajarnya. Perayu kedua dan ketiga menafikan bahawa mereka telah membuat sebarang representasi kepada TSK. Selepas perbicaraan, Mahkamah Tinggi menolak tuntutan balas Holsten (kecuali penalti RM225,000 yang Holsten perlu bayar CSR) dan membenarkan tuntutan TSK terhadap Holsten dalam jumlah RM1,031,000. Dalam membuat keputusannya, Mahkamah Tinggi memutuskan bahawa: (a) kedua-dua TSK dan Holsten telah melanggar kontrak; (b) kekecewaan perlaksaan kontrak itu; (c) Holsten tidak mempunyai hak di bawah kontrak untuk mengambil jumlah bayaran pendahuluan yang ia telah diwajibkan di bawah ss 74(3) dan 75 Akta Kontrak 1950 untuk dipulangkan kepada TSK dengan menolak RM225,000 yang Holsten perlu bayar CSR sebagai penalti di bawah kontrak mereka; dan (d) perayu kedua dan ketiga tidak bertanggungjawab kepada TSK kerana salah nyata. Holsten merayu terhadap keputusan itu.

Diputuskan, sebulat suara membenarkan sebahagian rayuan:

(1) Klausa 17 kontrak itu dengan jelas memasukkan Peraturan Persatuan Gula Bertapis ('RSA') ke dalam kontrak. Hakim Mahkamah Tinggi ('HMT') terkhilaf kerana gagal mempertimbangkan, apatah lagi mengguna pakai, klausa 17 dan RSA dalam kes semasa (lihat perenggan 17).

(2) Klausa 7 kontrak dengan jelas memperuntukkan bahawa kontrak itu hanya sah dari 4 April 2017 hingga 31 Julai 2017 ('tempoh kontrak'). Peraturan 7(i) dan (ii) RSA menghendaki TSK sebagai pembeli barangan untuk melaksanakan kewajipan berikut — untuk memberi notis kepada Holsten dalam tempoh kontrak butir-butir nama kapal di mana barangan itu akan dihantar oleh Holsten, jangkaan masa ketibaan kapal di pelabuhan muatan, tan barangan yang akan dimuatkan ke atas kapal, rujukan tempahan fret yang berkaitan dengan kapal, lokasi depoh perkapalan dari yang mana bekas kosong itu akan dikumpulkan oleh Holsten, tarikh timbunan kontena buka dan tutup terminal pemuatan berkenaan dengan vesel yang dicadangakan dan butiran laluan perkapalan dan terminal pemuatan. Peraturan 26 RSA juga memerlukan notis TSK kepada Holsten untuk dihantar melalui kurier atau dihantar melalui faks atau e-mel. Memandangkan perkataan 'hendaklah' digunakan dalam rr 7(i) dan (ii) dan dalam r 26 RSA, pelaksanaan yang

diperlukan oleh TSK dalam pemberian notis kepada Holsten di bawah peruntukan tersebut adalah wajib dan hanya selepas selesai pelaksanaan itu yang Holsten dikehendaki menjalankan kewajipannya di bawah kontrak termasuk membungkus barangan, mendapatkan perlindungan insurans untuk mereka dan memberikan dokumen penghantaran yang berkaitan kepada TSK mengikut klausa 10 kontrak. Sebaik sahaja dokumen penghantaran dikemukakan kepada TSK, klausa 9 memerlukan TSK membayar baki harga kontrak secara tunai dalam masa 72 jam dan selepas menerima jumlah tersebut Holsten dikehendaki menghantar barangan dalam tempoh kontrak. Perintah pelaksanaan tanggungjawab pihak ini bukan sahaja diperuntukkan secara nyata di bawah kontrak tetapi juga disokong oleh s 35 Akta Jualan Barang 1957 dan s 53 Akta Kontrak 1950. HMT gagal untuk melaksanakan perintah pelaksanaan obligasi oleh pihak-pihak tersebut (lihat perenggan 19–25).

(3) Memandangkan TSK gagal melaksanakan obligasinya di bawah kontrak semasa tempoh kontrak (disebabkan, seperti yang diakui oleh TSK, akibat kejatuhan harga pasaran barangan), Holsten telah dilepaskan daripada pelaksanaan obligasinya di bawah kontrak. TSK yang telah melanggar kontrak dan HMT secara fakta salah dalam membuat kesimpulan bahawa kedua-dua TSK dan Holsten telah melanggar kontrak (lihat perenggan 26–27).

(4) HMT terkhilaf dalam memutuskan kontrak itu telah dikecewakan. Kontrak tidak dapat dilaksanakan semata-mata kerana pelanggaran TSK. Ia tidak menjadi mustahil untuk dilaksanakan kerana berlakunya peristiwa selepas pembentukan kontrak dalam pengertian bahagian pertama s 57(2) Akta Kontrak 1950. Bahagian kedua s 57(2) tidak terpakai kerana TSK tidak boleh bergantung pada pelanggarannya sendiri untuk menyatakan bahawa kontrak itu telah dikecewakan. TSK tidak pernah memplidkan kekecewaan di bawah s 57(2) Akta Kontrak sebagai alasan untuk melaksanakan prestasi lanjutan kontrak. Ia juga tidak memfailkan sebarang penghujahan bertulis mengenai kekecewaan kontrak (lihat perenggan 30).

(5) HMT terkhilaf dalam menggunakan s 74(3) Akta Kontrak. Peruntukan itu tidak terpakai dalam kes semasa. Ia hanya terpakai dalam kes di mana tiada perjanjian tetapi 'kewajipan yang serupa dengan kontrak telah berlaku' (lihat perenggan 31–32).

(6) Klausa 9 kontrak itu adalah peruntukan penalti yang membenarkan Holsten mengekalkan jumlah bayaran pendahuluan jika TSK melanggar kontrak. Memandangkan kerugian yang dialami Holsten, jumlah bayaran pendahuluan adalah 'pampasan yang munasabah' kepada Holsten di bawah s 75 Akta Kontrak 1950 dan memandangkan s 75 menghalang Holsten daripada menuntut sebarang jumlah yang melebihi jumlah pendahuluan pembayaran, Mahkamah Tinggi, atas alasan itu

sahaja, adalah wajar untuk menolak tuntutan balas (lihat perenggan 39 & 41).]

Cases referred to

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)
Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd [2019] 6 MLJ 15; [2019] 2 CLJ 723, FC (refd)
Kam Siew v Tan Tong Keong & Ors [2023] MLJU 1670; [2023] 7 AMR 334, HC (refd)
NVJ Menon v The Great Eastern Life Assurance Co Ltd [2004] 3 MLJ 38; [2004] 3 CLJ 96, CA (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (refd)

Legislation referred to

Contracts Act 1950 ss 53, 57(2), 74(3), 75
Sale of Goods Act 1957 ss 2, 35

Appeal from: Civil Suit No JB-22NCVC-67–11 of 2018 (High Court, Muar)

Sivasankar a/l Chelliah (with Prabhakaran a/l Ramasamy) (R Kengadharan & Co) for the appellants.
Gunaseelan a/l Ganesan (G Gunaseelan & Assoc) for the respondent.

Wong Kian Kheong JCA:

A. BACKGROUND

[1] We shall refer to parties as they were in the High Court.

[2] On 27 March 2017, the first defendant company ('first defendant') agreed to buy 5,000 metric tonnes (mt) of sugar from Central Sugars Refinery Sdn Bhd ('CSR') at a price of US$550 per mt.

[3] The plaintiff company ('plaintiff') entered into a contract dated 4 April 2017 with the first defendant ('contract'). The salient provisions of the contract are as follows:

1.	Seller	[1st Defendant]
2.	Buyer	[Plaintiff]
3.	Product	White Refined Cane Sugar CSR
...	...	...

6.	Quantity & Packing	5,000 mt at Seller's option packed in polythene lined polypropylene bags of 50 kilograms net weight each with minimum standard producer's markings. Seller to load around 25 mt per 20 ft fcl load.
7.	Shipping period & Delivery basis	Shipment to be effected during 4/4/2017–31/07/2017 at the Seller's option.
8.	Price	USD560/mt Free On Board (FOB) Port Klang, Malaysia.
9.	Payment	Prepayment of 10% of contractual value or USD280,000 to be payable and received into Seller's nominated bank account upon confirmation. Balance payment of 90% of each shipment value to be effected to Seller by Cash against presentation to Buyer of scanned copies of Documents listed below within 72 hours. The date of receipt of Payment into Seller's Nominated Account is considered the date of payment. ... ... In the event that the Buyer fails to effect any payment in compliance with the terms of this Contract, the Seller has, at its sole discretion the right to renegotiate the terms of the contract, extend the shipment period or terminate the contract. Any and all costs, expenses and/or damages which the Seller may incur by reason of (but not limited to) the above will be entirely for the account of the Buyer and Buyer agrees to indemnify Seller for such amounts. Buyer agrees that any deposit of value paid by Buyer under this Contract or any other; may be used by the Seller at his sole discretion to cover: the value of the cargo delivered under the Contract; or any sums due thereunder; or any costs, expenses and/or damages it may suffer by reason of Buyer's breach(es) of any current, past and/or future contracts between Buyer and Seller or any other amounts due under such contracts. Costs, expenses and/or damages to

		include (without limitation) detention, demurrage, financing costs or charges, any other standby charges or any unliquidated damages as per the Seller's calculations. Balance payment, to be effected to Sellers before every shipment delivered to Buyer.
10.	Documentary Instructions	Seller to provide Buyers the following documents ('Documents') only: – Commercial Invoice. – Shipped 'on board' Bills of lading. – Certificate of weight quality and packing issued by independent surveyor or manufacturer at seller's option. – Certificate of Origin issued by Chamber of Commerce. ... As per Refined Sugar Association (Further referred as RSA) terms, buyer to provide documents instructions in due time.
...	...	...
12.	Container Demurrage	As per standard free time for line demurrage charges at Destination applicable for the shipping line and port(s) under this Contract. Port storage and/or other local port/shipping line charges at destination are always at buyer's account.
13.	Destination	Buyer agrees that the goods will not be resold to, disposed of, or to be transported on a vessel or by other carrier owned, flagged or chartered by any country (including Cuba), person or entity which would cause Seller to be in violation of or be penalized by US and/or European Union economic sanctions law ...
14.	Insurance	Seller will provide Buyer with insurance as per the terms and conditions of Refined Sugar Association which includes coverage on all risks to the cargo as per the Institute Commodity Trade Clauses (A).

17.	Other Terms and Conditions	Other terms and conditions not stipulated in this Contract shall be as per terms and conditions of Refined Sugar Association or Incoterms 2010, which are hereby incorporated. Should any clause of this Contract be in conflict with the rules of the RSA or Incoterms 2010, the clauses of this Contract shall prevail ...

[4] The second and third defendants ('second defendant' and 'third defendant') are directors of the first defendant.

[5] On 18 April 2017, the plaintiff paid RM1,256,080 (equivalent to US$280,000) ('10% prepayment sum') to the first defendant as 10% of the price for 5,000 mt of white refined sugar ('sugar'), namely US$2,800,000.

[6] The plaintiff's solicitors sent a letter dated 18 September 2018 ('plaintiff's demand') to the first, second and third defendants (collectively referred to in this judgment as 'defendants'). According to the plaintiff's demand, among others:

(1) the plaintiff had paid the 10% prepayment sum for the purchase of 5,000 mt of the sugar;

(2) the defendants had failed to deliver the sugar to the plaintiff; and

(3) the plaintiff demanded for the defendants to pay to the plaintiff's solicitors the sum of RM1,256,000 with an amount of RM200 for the plaintiff's demand within seven days from the date of the plaintiff's demand and if the defendants failed to do so, the plaintiff would file a suit against the defendants.

[7] The plaintiff's demand was denied by a letter dated 3 October 2018 by the first defendant's then solicitors ('first defendant's reply'). The first defendant's reply stated as follows, among others:

(1) the plaintiff breached the contract when the plaintiff failed to order the sugar for delivery within the 'agreed shipping period ie from 4.4.2017 to 31.7.2017'; and

(2) as the said shipping period had lapsed, the first defendant had 'forfeited' the 10% prepayment sum.

B. HIGH COURT PROCEEDINGS

[8] The plaintiff's statement of claim ('SOC') pleaded as follows, among others:

(1) the plaintiff and defendants had concluded the contract;

(2) the 10% prepayment sum had been paid by the plaintiff;

(3) the defendants had an obligation under the contract to provide the following documents to the plaintiff:

(a) commercial invoice;

(b) 'on board' bill of lading;

(c) certificate of weight, quality and packing issued by an independent surveyor; and

(d) certificate of origin issued by the chamber of commerce,

('shipping documents').

(4) the second and third defendants had represented to the plaintiff that the plaintiff would make a profit from the contract in view of the price for the sugar as provided in the contract ('contract price') as compared to the market price of the sugar at the time of the contract ('representation (second and third defendants)');

(5) the defendants breached the contract when the defendants failed to provide the shipping documents to the plaintiff;

(6) as an alternative claim, the market price of the sugar was lower than the contract price. Hence, the contract was breached when the representation (second and third defendants) could not be fulfilled; and

(7) due to the defendants' breach of the contract, the plaintiff claimed for, among others, a refund of the 10% prepayment sum from the defendants ('original action').

[9] The defendants denied the original action and counterclaimed as follows, among others ('counterclaim'):

(1) the contract:

(a) was between the plaintiff and first defendant only; and

(b) did not concern the second and third defendants.

(2) the second and third defendants denied making the representation (second and third defendants);

(3) under cl 17 of the contract ('cl 17'), the Rules of 'The Refined Sugar Association' ('RSA') shall apply to the contract;

(4) before the first defendant could issue the shipping documents to the plaintiff:

(a) r 7(i) RSA provides that within the contract delivery period, the plaintiff had to give 'reasonable notice' to the first defendant ('plaintiff's notice') regarding the following particulars:

(i) name of the vessel on which the sugar was to be shipped ('vessel');

(ii) the expected time of arrival of the vessel at the loadport; and

(iii) the tonnage of sugar to be loaded on the vessel.

(b) according to r 7(ii) RSA, the plaintiff had to provide the following details to the first defendant:

(i) the freight booking reference relating to the vessel;

(ii) the location of the depot(s) of the shipping line from which the empty containers were to be collected by the first defendant; and

(iii) the opening and closing container stack dates of the loading terminal.

(c) r 26 RSA provides that the plaintiff's notice 'shall be delivered by courier or transmitted by, facsimile or electronic email';

(5) the plaintiff's notice was not sent to the first defendant because the market price of sugar had dropped and the plaintiff would have suffered a loss by sending the plaintiff's notice to the first defendant. Consequently, the plaintiff had breached the contract ('plaintiff's alleged breach (contract)'); and

(6) as a result of the plaintiff's alleged breach (contract), the first defendant had suffered the following loss, among others:

(a) a sum of RM222,500 as loss of profit which the first defendant would have enjoyed if the contract had been performed by the plaintiff ('first defendant's alleged loss of profit');

(b) the first defendant had purchased the sugar from CSR ('sugar (CSR)') so as to supply the sugar to the plaintiff under the contract. Consequently, the first defendant had to resell the sugar (CSR) at a loss;

(c) 'marketing loss' in a sum of RM574,851;

(d) 'operation loss' of RM479,042.50; and

(e) other expenses amounting to RM95,085.

[10] After a trial, the learned High Court judge decided as follows, among others:

(1) the original action was allowed wherein:

(a) the first defendant was ordered to pay a sum of RM1,031,000 ('judgment sum') to the plaintiff with interest of 5%pa on the judgment sum from the date of the filing of the writ in this case until full payment of the judgment sum by the first defendant; and

(b) costs of RM10,000 (subject to allocatur fee) shall be paid by the first defendant to the plaintiff.

(2) the counterclaim was dismissed with no order as to costs,

('High Court's decision').

[11] The defendants appealed to this court against the High Court's decision ('this appeal').

C. REASONS FOR HIGH COURT'S DECISION

[12] The learned High Court judge's grounds of judgment ('GOJ') gave the following reasons, among others, for the High Court's decision:

(1) both the plaintiff and first defendant had not complied with the contract — please refer to sub-para 12(ii) GOJ; and

(2) in sub-para 12(iii) GOJ, the learned High Court judge decided as follows:

(a) the contract did not provide for the first defendant's forfeiture of the 10% prepayment sum;

(b) the contract had been frustrated;

(c) the plaintiff was allowed to claim for the return of the 10% prepayment sum from the first defendant premised on:

(i) s 75 of the Contracts Act 1950 ('the CA') as interpreted by Richard Malanjum CJ (Sabah and Sarawak) (as he then was) in the Federal Court case of *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15; [2019] 2 CLJ 723; and

(ii) s 74(3) of the CA.

(d) the learned High Court judge allowed the first defendant to deduct a sum of RM225,000 (which was paid by the first defendant to CSR as 'penalty'

A with regard to the sugar (CSR) purchased by the first defendant from CSR ('first defendant's penalty payment (CSR))') from the first defendant's refund of the 10% prepayment sum to the plaintiff;

(e) the original action against the second and third defendants was dismissed because the plaintiff had not adduced any evidence regarding the representation (second and third defendants); and

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(f) the counterclaim regarding:

(i) the first defendant's 'negotiation and acquisition' fee of RM750,000; and

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(ii) the first defendant's alleged loss of profit had not been proven by the first defendant.

D. SUBMISSION BY PARTIES

D

[13] In support of this appeal, the defendants' learned counsel has contended as follows, among others:

(1) premised on cl 17 and r 7 RSA, the first defendant was only required to ship the sugar after receiving the plaintiff's notice. The plaintiff's director, Mr Lee Choon Guek, admitted that the plaintiff's notice was not given to the first defendant because the price of sugar had fallen at the material time ('plaintiff's admission'). In view of the plaintiff's admission, the plaintiff (not the first defendant) had breached the contract;

E

F

(2) the contract did not provide for a termination clause. Even if the first defendant had breached the contract, the plaintiff did not terminate the contract; and

G (3) the learned High Court judge committed the following appealable errors by deciding that:

(a) both the plaintiff and first defendant had breached the contract; and

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(b) the contract had been frustrated.

[14] According to the plaintiff's learned counsel, the High Court's decision should be upheld by this court on, among others, the following grounds:

I (1) the learned High Court judge did not commit any 'plain error' in this case; and

(2) both the plaintiff and first defendant had breached the contract. Hence, s 75 of the CA and *Cubic Electronics* allowed the plaintiff to claim for the judgment sum, namely, the return of the 10% prepayment sum minus

the first defendant's penalty payment (CSR).

E. ISSUES

[15] The following questions arise in this appeal:

(1) whether the plaintiff or first defendant had breached the contract. In this regard, by virtue of cl 17, should the learned HC judge have applied rr 7(i), (ii) and 26 RSA in this case?

(2) if the plaintiff had breached r 7(i) and (ii) RSA read with cl 17:

(a) whether the court could decide that the contract had been frustrated under s 57(2) of the CA

(b) in view of the contract, is s 74(3) of the CA applicable in this case? and

(c) whether cl 9 of the contract (cl 9) (which allowed the first defendant to use the 10% prepayment sum at the first defendant's 'sole discretion to cover' 'any sums' due under the contract 'or any costs, expenses and/or damages' the first defendant may suffer by reason of the plaintiff's breach of the contract) is a 'stipulation by way of penalty' within the meaning of s 75 of the CA.

(3) if cl 9 constitutes a 'penalty' clause pursuant to s 75 of the CA, can the first defendant refuse to return the 10% prepayment sum to the plaintiff? This issue depends on whether the plaintiff can prove that the 10% prepayment sum does not constitute 'reasonable compensation' for the plaintiff's breach of the contract.

OUR DECISION

F. WHO HAD BREACHED CONTRACT?

F(1) Whether rr 7(i), (ii) and 26 RSA applied in this case

[16] According to the Court of Appeal's judgment delivered by Gopal Sri Ram JCA (as he then was) in *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38 at pp 44–45; [2004] 3 CLJ 96 at pp 103–104, the construction of an agreement is a question of law to be decided by the court and not by factual and expert witnesses through their oral evidence.

[17] Clause 17 had expressly incorporated RSA into the contract. In our view, the learned High Court judge had failed to consider, let alone apply, cl 17 and RSA in this case ('first legal error').

F(2) What was 'order of performance' of contract?

[18] Clause 8 contract had stipulated that the sugar would be shipped 'Free On Board' ('FOB'). We reproduce below the relevant part of rr 7(i), (ii) and 26 of the RSA regarding FOB agreements:

RULES RELATING TO CONTRACTS DELIVERY

FAS, *FOB* AND FOB AND STOWED *CONTRACTS*

r 7(i) *In all cases of* FAS and *FOB contracts, whether for shipment in bulk or bags or for shipment in containers, and in all cases of FOB* and Stowed *contracts, the following shall apply*:

The Seller shall have the sugar ready to be delivered to the Buyer at any time within the contract delivery period. The Buyer having given reasonable notice, shall be entitled to call for delivery of the sugar between the first and last working day inclusive of the contract delivery period. The Buyer shall give notice (see Rule 26) to the Seller of the name/s of the vessel/s on which the sugar is to be shipped, the vessel/s expected time of arrival at the loadport and the tonnage to be loaded.

...

r 7(ii) *In addition, the following shall apply as appropriate to* FAS, *FOB* and FOB and Stowed *contracts for shipment in bulk or bags and to* FAS and *FOB contracts for shipment by container*:

...

FAS AND *FOB CONTRACTS FOR SHIPMENT BY CONTAINERS*

In the case of FAS and *FOB contracts for shipment by containers, the following shall apply*:

At the time of giving notice as set out in Rule 7(i), the Buyer shall also provide to the Seller:

(a) *the freight booking reference relating to the vessel/s, clearly indicating the closing date of the vessel/s, the location(s) of the depots of the shipping line from which empty containers are to be collected by the Seller (which must be customary for the port of loading) and the opening and closing container stack dates of the loading terminal in respect of the nominated vessel/s*; and

(b) *relevant contact details of the shipping line and the loading terminal.*

...

NOTICES

r 26 *Any notice to be served by the Seller or the Buyer under these Rules shall be delivered by courier or transmitted by, facsimile or electronic mail.* (Emphasis added.)

[19] Clause 7 contract (cl 7) had expressly provided that the contract was only valid for a period from 4 April 2017 to 31 July 2017 ('contractual period').

[20] As the contract concerns a commercial transaction, the contract shall be interpreted in a commercially sensible manner — please refer to the Federal Court's judgment delivered by Gopal Sri Ram FCJ in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 at [10]. A commercially sensible construction of the contract reveals the following 'order of performance' of contractual obligations of the plaintiff and first defendant:

(1) r 7(i) and (ii) RSA require the plaintiff as the buyer of the sugar to perform the following contractual obligations:

(a) according to r 7(i) RSA, the plaintiff's notice 'shall' be given to the first defendant within the contractual period and the plaintiff's notice shall contain the following particulars:

(i) the name(s) of the vessel(s) on which the sugar is to be shipped by the first defendant;

(ii) the expected time of arrival of the vessel(s) at the 'loadport'; and

(iii) the tonnage of sugar to be loaded onto the vessel(s).

(b) r 7(ii)(a) and (b) RSA state that the plaintiff's notice shall also contain the following matters:

(i) the freight booking reference relating to the vessel(s) which indicates the closing date of the vessel(s), the location(s) of the depots of the shipping line from which empty containers are to be collected by the first defendant and the opening and closing container stack dates of the loading terminal in respect of the nominated vessel(s); and

(ii) the relevant contact details of the shipping line and the loading terminal.

(c) r 26 RSA provided that the plaintiff's notice 'shall be delivered by courier or transmitted by, facsimile or electronic mail' to the first defendant,

('plaintiff's first required performance').

The plaintiff first required performance is mandatory because rr 7(i), (ii) and 26 have employed the imperative term 'shall'.

(2) the plaintiff first required performance include the following obligations to be undertaken by the plaintiff:

(a) according to cl 12 contract (cl 12), 'port storage' and other line charges at the port(s) of destination shall be borne by the plaintiff. Hence, cl 12 supports the plaintiff first required performance, ie, the plaintiff has to perform the first contractual obligation of nominating the vessel(s) and the port(s) of destination of the sugar; and

(b) by reason of cl 13 contract (cl 13), the plaintiff agreed that the sugar would not be 'resold to, disposed of, or to be transported on a vessel or by other carrier owned, flagged or chartered by any country (including Cuba), person or entity which would cause [the first defendant] to be in violation of or be penalized by US and/or European Union economic sanctions law'. Once again, cl 13 supports the plaintiff first required performance, namely, the plaintiff's initial obligation to ensure that the contents of the plaintiff's notice would not cause the first defendant to violate and/or be penalised by 'economic sanctions' imposed by the United States of America and/or European Union.

(3) once the plaintiff first required performance is completed, then and only then is the first defendant required to perform the following matters under the contract ('first defendant's first required performance'):

(a) the first defendant had to pack the sugar — please refer to cl 6 contract;

(b) according to cl 14 contract, the first defendant should provide insurance coverage of the sugar as provided in RSA; and

(c) the first defendant should provide the shipping documents to the plaintiff in accordance with cl 10 contract (cl 10).

(4) upon the first defendant's presentation of the shipping documents to the plaintiff ('first defendant's presentation (shipping documents)'), cl 9 required the plaintiff to pay 90% of the contract price in cash within 72 hours from the time of the first defendant's presentation (shipping documents) ('plaintiff's second required performance'); and

(5) after the plaintiff's second required performance is completed, cl 7 requires the first defendant to ship the sugar during the contractual period ('first defendant's second required performance').

In this judgment, we shall refer to the plaintiff's first required performance, first defendant's first required performance, plaintiff's second required performance and first defendant's second required performance collectively as the 'order of performance of obligations (contract)'.

[21] The above interpretation regarding the order of performance of obligations (contract) is supported by s 35 of the Sale of Goods Act 1957 ('the SGA') and s 53 of the CA. This contract concerned sugar which falls within the definition of 'goods' in s 2 of the SGA (every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale).

[22] I reproduce below s 35 of the SGA and s 53 of the CA:

> s 35 SGA Buyer to apply for delivery.
>
> *Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery*.
>
> s 53 CA Order of performance of reciprocal promises.
>
> *Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order* and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires. (Emphasis added.)

[23] Firstly, s 35 of the SGA only applies in the absence of 'express contract'. As explained in the above para 20, the contract had expressly provided for the order of performance of obligations (contract).

[24] Secondly, in accordance with s 53 of the CA, as the order of performance of obligations (contract) had been 'expressly fixed' by the contract, the order of performance of obligations (contract) 'shall be performed in that order'.

[25] The learned High Court judge had erred in law by failing to give effect to the order of performance of obligations (contract), s 35 of the SGA and s 53 of the CA ('second legal error').

[26] In this case, the plaintiff's first required performance had not been performed during the contractual period. Accordingly:

(1) the first defendant's first required performance did not arise at all; and

(2) the plaintiff had breached the contract when the plaintiff's first required performance was not carried out ('plaintiff's breach (contract)'). According to the plaintiff's admission, the plaintiff's notice was not given to the first defendant because the price of sugar had fallen at the material time.

[27] It is trite law that an appellate court can only set aside a plain factual error made by the trial court — please refer to the Federal Court's judgment delivered by Zabariah Yusof FCJ in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at [78]. In this appeal, we are of the view that the learned High Court judge has committed a 'plain factual error' as follows:

(1) the High Court had decided that both the plaintiff and first defendant had breached the contract; and

(2) the learned High Court judge had failed to find that the plaintiff's breach (contract) had been committed,

('first plain factual error').

G. WAS CONTRACT FRUSTRATED?

[28] Section 57(2) of the CA provides as follows:

> *A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.* (Emphasis added.)

[29] The application of s 57(2) of the CA has been explained in *Kam Siew v Tan Tong Keong & Ors* [2023] MLJU 1670; [2023] 7 AMR 334 at [63], as follows:

> [63] *I am of the view that a party to a contract (Z) can only rely on s 57(2) of the CA to excuse Z's further performance of the contract in the following two scenarios:*
>
> (1) *according to the first limb of s 57(2) of the CA (first limb [s 57(2) CA)), Z's further performance of the contract had become 'impossible' due to the occurrence of an event after the formation of the contract (subsequent event). Cases have given a technical meaning to the term 'impossible' in the first limb (s 57(2) of the CA); or*
>
> (2) the second limb of s 57(2) of the CA (second limb (s 57(2) of the CA)) applies when the following two conditions are fulfilled cumulatively:
>
> (a) *the subsequent event rendered unlawful Z's further performance of the contract; and*
>
> (b) *the occurrence of the subsequent event could not have been prevented by Z. It is clear that Z could not rely on a subsequent event which has been caused or induced by Z. In this regard, I rely on the following judgment of the Court of Appeal delivered by Gopal Sri Ram JCA (as he then was) in Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd* [2007] 4 MLJ 201*, at [7]:*
>
> [7] *It follows from the foregoing authorities that there are three elements woven into the fabric of the doctrine embodied in s 57. First, the event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If provision has been made then the parties must be taken to have allocated the risk between them. Second, the event relied upon by the promisor must be one for which he or she is not responsible. Put shortly, self induced frustration is ineffective. Third, the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically unjust to enforce the original promise. If any of these elements are not present on the facts of a given case, then s 57 does not bite.* (Emphasis added.)

[30] With respect, the High Court's decision that the contract had been

frustrated, constitutes a plain error of fact ('second plain factual error'). The second plain factual error is premised on the following evidence and reasons:

(1) the contract could not be performed due solely to the plaintiff's breach (contract) — please refer to the above paragraph 26. In other words, the contract did not become 'impossible' to be performed due to the occurrence of an event after the formation of the contract within the meaning of the first limb of s 57(2) of the CA;

(2) the second limb of s 57(2) of the CA does not apply in this case because the plaintiff could not rely on a self-induced frustration, ie, the plaintiff's breach (contract), to frustrate the contract; and

(3) the SOC did not plead frustration pursuant to s 57(2) of the CA as a ground to discharge further performance of the contract. Nor did the plaintiff file any written submission regarding the frustration of the contract.

H. CAN HIGH COURT APPLY S 74(3) OF THE CA IN THIS CASE?

[31] According to s 74(3) of the CA:

> *When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if the person had contracted to discharge it and had broken his contract.* (Emphasis added.)

[32] Section 74(3) of the CA only applies in a case where there is no agreement but there exists 'an obligation resembling those created by contract has been incurred'. In view of the contract in this case, the learned High Court judge had committed an error of law by invoking s 74(3) of the CA in this case ('third legal error').

I. CONSEQUENCES OF PLAINTIFF'S BREACH (CONTRACT)

I(1) First defendant was relieved of obligations under contract

[33] As a result of the plaintiff's alleged breach (contract), the first defendant's first required performance and first defendant's second required performance need not be carried out.

I(2) Effect of s 75 of the CA

[34] Section 75 of the CA provides as follows:

> s 75 Compensation for breach of contract where penalty stipulated for
>
> *When a contract has been broken, if a sum is named in the contract as the amount to be*

paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. (Emphasis added.)

I(2A) Whether cl 9 is a 'penalty' clause under s 75 of the CA

[35] Clause 9 allowed the first defendant to use the 10% prepayment sum at the first defendant's 'sole discretion to cover' 'anycontract sums' due under the contract 'or any costs, expenses and/or damages' the first defendant may suffer by reason of the plaintiff's breach (contract).

[36] We will now decide whether cl 9 constitutes a penalty clause within the meaning of s 75 of the CA. To decide this question:

(1) the court is not bound by the label attached by the plaintiff and first defendant to cl 9. Consequently, the fact that cl 9 had used the term 'prepayment' is not conclusive; and

(2) the court has to ascertain the substance and effect of cl 9 upon the plaintiff's breach (contract).

The above approach is supported by the following judgment in *Cubic Electronics*, at [52] and [53]:

> [52] *In any event, as enunciated by Lord Neuberger, Lord Sumption and Lord Carnwarth in Cavendish at para [15], 'the classification of terms for the purpose of the penalty rule depends on the substance of the term and not on its form or on the label which the parties have chosen to attach to it'. This echoes the earlier sentiment of the Privy Council in Linggi Plantations where Lord Hailsham recognised at p 94 that*:
>
> > *It is also no doubt possible that in a particular contract the parties may use language normally appropriate to deposits properly so-called and even to forfeiture which turn out on investigation to be purely colourable and that in such a case the real nature of the transaction might turn out to be the imposition of a penalty, by purporting to render forfeit something which is in truth part payment*.
>
> [53] *Thus, in our case, the legislative mechanism introduced by s 75 of the Act must be considered a necessary curtailment of absolute freedom of contract, designed to check against potential abuse by a party at another's expense.* (Emphasis added.)

[37] In our considered view, an objective interpretation of the substance and effect of cl 9 reveals that cl 9 is a penal contractual provision (as understood in s 75 of the CA) which applies in the event of a breach of the contract by the plaintiff. This is because upon the occurrence of the plaintiff's breach (contract):

(1) cl 9 conferred 'sole discretion' on the first defendant to use the 10% prepayment sum irrespective of whether the first defendant had suffered any actual loss due to the plaintiff's breach (contract) ('first defendant's loss') or not; and

(2) cl 9 did not provide that:

(a) the first defendant was only entitled to keep part of the 10% prepayment sum which was equivalent to the first defendant's loss; and

(b) the first defendant was obliged to return to the plaintiff the balance of the 10% prepayment sum (after taking into account the first defendant's loss).

I(2B) Was 10% prepayment sum 'reasonable compensation' of plaintiff's breach (contract) for first defendant?

[38] It is decided in *Cubic Electronics*, at [74], as follows:

> [74] *In summary and for convenience, the principles that may be distilled from hereinabove are these:*
>
> ...
>
> (iv) *In determining what amounts to 'reasonable compensation' under s 75 [CA], the concepts of 'legitimate interest' and 'proportionality' as enunciated in Cavendish are relevant.*
>
> (v) *A sum payable on breach of contract will be held to be unreasonable compensation if it is extravagant and unconscionable in amount in comparison with the highest conceivable loss which could possibly flow from the breach. In the absence of proper justification, there should not be a significant difference between the level of damages spelt out in the contract and the level of loss or damage which is likely to be suffered by the innocent party*.
>
> (vi) *s 75 [CA] allows reasonable compensation to be awarded by the court irrespective of whether actual loss or damage is proven. Thus, proof of actual loss is not the sole conclusive determinant of reasonable compensation although evidence of that may be a useful starting point*.
>
> (vii) *The initial onus lies on the party seeking to enforce a damages clause under s 75 [CA] to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein, if any.*
>
> (viii) *If there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause including the sum stated therein is unreasonable.* (Emphasis added.)

[39] Premised on s 75 of the CA (as construed by *Cubic Electronics*), we express the following view:

(1) the first defendant had succeeded to discharge the initial burden to prove:

(a) the plaintiff's breach (contract); and

(b) cl 9 was a penalty provision which allowed the first defendant to retain the 10% prepayment sum — please refer to the above para 37.

(2) taking into account the concepts of 'legitimate interest' (of the plaintiff and first defendant) and 'proportionality', the 10% prepayment sum constituted 'reasonable compensation' for the first defendant's loss arising from the plaintiff's breach (contract). This decision is due to the following evidence and reasons:

(a) the first defendant's penalty payment (CSR) had been incurred;

(b) the first defendant was deprived of profit which would have been enjoyed by the first defendant if the plaintiff had performed the contract;

(c) the first defendant had to resell the sugar to third parties at a loss; and

(d) the 10% prepayment sum constituted only 10% of the contract price.

(3) the plaintiff had failed to discharge the onus to show that:

(a) the 10% prepayment sum was not a 'reasonable compensation' to the first defendant for the plaintiff's breach (contract); and

(b) the first defendant's refusal to return the 10% prepayment sum to the plaintiff was 'unreasonable', 'disproportionate', 'unconscionable' and/or 'extravagant'.

[40] With respect, the learned High Court judge had committed an error of law when she failed to apply s 75 of the CA (as interpreted by *Cubic Electronics*) in this case ('fourth legal error') — please refer to the above para 39.

I(2C) Should counterclaim be allowed?

[41] By reason of s 75 of the CA, the first defendant cannot claim from the plaintiff for a sum in excess of 10% prepayment sum. On this ground alone, the High Court was justified to dismiss the counterclaim.

J. OUTCOME OF THIS APPEAL

[42] Premised on the first to fourth legal errors, first and second plain factual errors, this appeal is allowed with the following order:

(1) part of the High Court's decision (which allowed the original action against the first defendant with costs) is set aside; and

(2) the plaintiff shall pay to the defendants costs of RM20,000 here and below (subject to allocatur fee).

Appeal allowed in part.

Reported by Ashok Kumar